(2)

No. 06-836

IN THE

Supreme Court of the United States

LIGIA PACHECO DE PEREZ, *et al.*,

Petitioners,

v.

AT&T CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF IN OPPOSITION

WILLIAM N. WITHROW, JR.
Counsel of Record
NORMAN L. UNDERWOOD
LYNETTE EADDY SMITH
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

Counsel for Respondents

206795

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the petition.

The only corporate Respondent is AT&T Corp. AT&T Corp.'s parent company is AT&T, Inc., which holds 100% of the stock of AT&T Corp.

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SUMMARY OF REASONS TO DENY THE PETITION

The federal question raised in the petition was never properly presented to or considered by the Georgia Supreme Court. For this reason alone, under this Court's well-established case law, the petition should be denied. In the alternative, the question raised in the petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review. Accordingly, for this additional reason, the petition should be denied.

COUNTERSTATMENT OF THE CASE

A. Petitioners' Claims.

This case arises out of a 1993 gas line explosion in Venezuela that occurred while fiber optic phone cable was being laid to update Venezuela's phone system. All of the Petitioners are Venezuelan residents. Every entity directly involved in the cable-laying project – the government-owned phone company, the owner of the gas line, the contractor laying the phone cable, and the subcontractor digging the trenches for the phone cable – is a Venezuelan entity that cannot be brought before any United States court. However, Respondent AT&T Corp. ("AT&T"), the indirect parent company of the Venezuelan contractor upgrading the phone system, is subject to suit in Georgia. For this reason, and this reason only, the 35 individual petitioners filed, in the State Court of Fulton County, Georgia, the two consolidated

[1] Because the Statement of facts set forth in the petition is incomplete and seriously misrepresents portions of the record, Respondents provide this Counterstatement setting forth the facts pertinent to the petition.

mass tort cases that are the subject of the petition. Petitioners brought their claims in Georgia despite the fact that all of their claims are governed by Venezuelan law and involve almost exclusively Venezuelan participants, Venezuelan witnesses, and Venezuelan-based evidence.

B. Proceedings Below.

This action has a long procedural history. [2] Petitioners filed their Complaints in the State Court of Fulton County, Georgia in September of 1995. Shortly thereafter, Respondents removed the actions to the United States District Court for the Northern District of Georgia and that court subsequently dismissed the consolidated action based upon the doctrine of *forum non conveniens.*

Petitioners appealed Respondents' removal and the district court's *forum non conveniens* dismissal to the Eleventh Circuit Court of Appeals. Addressing only the issue of whether the cases were properly removed, the Eleventh Circuit Court of Appeals found that the district court did not have subject matter jurisdiction over the cases, reversed the district court's dismissal of the cases, and instructed the district court to remand the cases to the State Court of Fulton

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[2] In addition to the two consolidated cases at issue in the petition, ten other actions were brought in various state and federal jurisdictions within the United States by Venezuelan plaintiffs against AT&T and various individual defendants in connection with the gas line explosion in Venezuela. Four of these actions were dismissed on the basis of *forum non conveniens*, one was *sua sponte* dismissed for lack of subject matter jurisdiction, and five were dismissed voluntarily by the plaintiffs. The causes of action asserted in each of these cases were substantially the same as those asserted in the instant case.

County, Georgia. *Perez v. AT&T Company*, 139 F.3d 1368 (11th Cir. 1998).

After remand, Respondents filed in the state trial court a Motion to Dismiss on the Basis of *Forum Non Conveniens*. In an Order dated July 20, 1999 (Appendix to the Petition for a Writ of Certiorari ("Pet. App."), 34), the trial court found that, under a traditional *forum non conveniens* analysis, Respondents' Motion to Dismiss should be granted. However, the trial court denied Respondents' Motion to Dismiss because it concluded that it did not have the inherent authority to dismiss, on the basis of *forum non conveniens*, claims brought by nonresident aliens for injuries occurring on foreign soil. (Pet. App. 40.) The trial court certified that its Order denying Respondents' Motion to Dismiss was one of such importance to the case that immediate review should be had. Thereafter, Respondents applied to the Georgia Court of Appeals for an interlocutory appeal of the trial court's denial of their Motion to Dismiss. The Court of Appeals denied Respondents' application for an interlocutory appeal. (Pet. App. 32, 33.)

On January 28, 2000, the Georgia Supreme Court granted Respondents' Petition for a Writ of Certiorari and noted that the court was particularly concerned with the following issue:

> Does a Georgia trial court have the inherent authority to dismiss, under the doctrine of *forum non conveniens*, a lawsuit brought by nonresident aliens for injuries occurring on foreign soil?

(Pet. App. 30.) Respondents argued to the Georgia Supreme Court that the Georgia trial court did have the inherent

authority to dismiss Petitioners' claims under the doctrine of *forum non conveniens.* Specifically, Respondents argued (1) that no prior holding of the Georgia Supreme Court answered the question of whether Georgia's trial courts have the inherent authority to dismiss, under the doctrine of *forum non convenines*, a lawsuit brought by nonresident aliens for injuries occurring on foreign soil; and (2) that neither the Georgia Constitution nor any Georgia statute grants to nonresident aliens an unqualified right of access to Georgia's courts.

In responding to Respondents' arguments at the Georgia Supreme Court, Petitioners never argued that a holding by the Georgia Supreme Court that the trial court had the inherent authority to dismiss Petitioners' claims under the doctrine of *forum non conveniens* would contravene the Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, Jan. 20, 1835, U.S.-Venez., 8 Stat. 466 (1836) (the "1836 Treaty").[3] In fact,

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[3] In fact, Petitioners never even made this argument to the trial court. Rather, Petitioners cited the 1836 Treaty in connection with a separate, distinct argument. Specifically, Petitioners argued to the trial court that, in any application of the *forum non conveniens* standard articulated by this Court in *Piper Aircraft Company v. Reyno*, 454 U.S. 235 (1981), the provisions of the 1836 Treaty precluded the court from affording less deference to Petitioners' choice of forum than to a domestic plaintiff's choice of forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (acknowledging, in the context of applying the *forum non conveniens* standard, that there is usually a strong presumption in favor of the plaintiff's choice of forum, but stating that the strength of the presumption is tempered when the plaintiff is a foreign national suing in the United States). Because the question presented in the petition was never raised in the trial court, the Georgia Supreme Court would

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Petitioners never even cited the 1836 Treaty in their briefs filed in the Georgia Supreme Court. Rather, Petitioners argued only state law grounds for affirming the order of the trial court. Specifically, Respondents argued (1) that O.C.G.A. §§ 1-2-10 and 1-2-11 grant to Venezuelan citizens a right of access to Georgia's courts equal to that of any Georgia resident; and (2) prior Georgia case law prevents the Georgia Supreme Court from concluding that Georgia's trial courts have the inherent authority to dismiss an action on the basis of *forum non conveniens.*

After briefing and oral argument, the Georgia Supreme Court reversed the decision of the trial court and held that Georgia trial courts do have the inherent authority to dismiss, on the basis of *forum non conveniens*, claims brought by nonresident aliens for injuries occurring on foreign soil.[4] *AT&T Corp. v. Sigala*, 549 S.E.2d 373, 375, 274 Ga. 137, 137 (2001) (Pet. App. 15). Specifically, the Georgia Supreme Court rejected Petitioners' interpretation of Georgia law and

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have found the issue waived and would have refused to consider the argument. *Cohran v. Carlin*, 331 S.E.2d 523, 254 Ga. 580 (1985) (argument not presented to trial court will not be considered on appeal).

[4] Notably, the holding of the Georgia Supreme Court that is the subject of the petition was quickly superseded by O.C.G.A. § 9-10-31.1, which was passed by the Georgia Legislature in 2005. Consequently, no movant in Georgia's trial courts would, today, base a *forum non conveniens* motion to dismiss on the Georgia Supreme Court's holding at issue in the petition. Rather, a movant would rely on O.C.G.A. § 9-10-31.1, which allows suits to be dismissed on the basis of *forum non conveniens* regardless of whether the suits are brought by individuals residing in Georgia, the United States, or elsewhere.

held (1) that O.C.G.A. §§ 1-2-10 and 1-2-11 do not apply to nonresident aliens; and (2) that the Georgia Supreme Court's prior decisions do not prevent the court from adopting the doctrine of *forum non conveniens* in this action. 549 S.E.2d at 377, 274 Ga. at 140 (Pet. App. 21-22.). Not surprisingly, the Georgia Supreme Court never mentioned in its order the 1836 Treaty, which was never cited by Petitioners. Petitioners moved the Georgia Supreme Court to reconsider the case, but that motion was denied.[5] (Pet. App. 13.)

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[5] In their motion for reconsideration, Petitioners listed 12 separate reasons why the Georgia Supreme Court should reconsider its decision. The twelfth listed error is, "The Court's Opinion, which bases a plaintiff's right of access to Georgia's courts upon different categories of citizenship and places of residence, violates anti-discrimination and equal protection provisions of the U.S. Constitution and laws, the laws and treaties of the United States which provide to foreign litigants access to U.S. Courts, and the anti-discrimination and court access provisions of the Georgia Constitution and statutes. Therefore, reconsideration should be granted." Significantly, even in their motion for reconsideration, Petitioners failed to identify the 1836 Treaty to the Georgia Supreme Court, let alone convey to the court the substance of that treaty. Moreover, under Georgia law, such a passing reference to the "laws and treaties of the United States" did not properly present the question at issue in the petition to the Georgia Supreme Court. *Cohran v. Carlin*, 331 S.E.2d 523, 528, 254 Ga. 580, 586 (1985) (enumerations of error not supported by argument or citation of authority found abandoned); *Wilkie v. State*, 266 S.E.2d 289, 290, 153 Ga. App. 609, 609 (1980) (finding enumerations of error abandoned for failure to support the errors with argument or citation of authority); *ESI, Inc. of Tenn. v. Westpoint Stevens*, 562 S.E.2d 198, 200, 254 Ga. App. 332, 334-335 (2002) (argument raised for the first time in a motion to reconsider did not properly preserve an issue for appeal because, "[i]nherent in a motion for reconsideration is a request to the court to reconsider an issue previously raised and/or ruled on").

After the case returned to the state trial court, the trial court re-addressed whether Petitioners' claims should be dismissed on the basis of *forum non conveniens*. After additional briefing and oral argument, the trial court entered an order conditionally dismissing this action on the basis of *forum non conveniens* in favor of the courts of Venezuela. (Pet. App. 2.)[6]

Petitioners appealed the state trial court's conditional dismissal to the Georgia Court of Appeals, but that court affirmed the decision of the trial court without opinion. (Pet. App. 1.) The Georgia Supreme Court denied Petitioners' petition for a writ of certiorari, which sought review of the trial court's conditional dismissal. (Pet. App. 41.) Thereafter, Petitioners filed the instant petition.

At no time before or after the Georgia Supreme Court's July 16, 2001 Order did Petitioners ever argue, to either the trial court, the Georgia Court of Appeals, or the Georgia Supreme Court, that a holding that the state trial court had the inherent authority to dismiss Petitioners' claims for *forum non conveniens* would violate the 1836 Treaty.[7] Petitioners'

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[6] The trial court's conditional dismissal of the case became final on March 18, 2004, after Respondents assented to the conditions provided in the trial court's February 11, 2004 conditional dismissal. (Pet. App. 12.)

[7] In 2005 Petitioners did argue for the first time to the Georgia Court of Appeals that O.C.G.A. § 50-2-21(b) violated the 1836 Treaty, and therefore that the trial court's conditional dismissal of the case for *forum non conveniens* should be reversed. However, as Respondents explained to the Georgia Court of Appeals, O.C.G.A. § 50-2-21 is irrelevant to this case. That statute grants to Georgia's

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claim that the 1836 Treaty precludes the Georgia Supreme Court's 2001 Order appeared for the first time in their petition that is now before the Court.[8]

REASONS FOR DENYING THE PETITION

I. Petitioners have not met their burden of showing that this case is proper for the Court's consideration.

Rule 14 of this Court provides that if, as is the case here, review of a state-court judgment is sought, the petitioner must

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trial courts the statutory authority to dismiss certain actions on the basis of *forum non conveniens*. However, the statute was passed after Petitioners filed this action in 2003 and applies only to cases filed after July 1, 2003, which this case was not. Moreover, neither the Georgia Supreme Court nor the trial court relied upon O.C.G.A. § 50-2-21(b) in their orders allowing this case to be dismissed for *forum non conveniens*. In affirming the trial court's conditional dismissal of the case without opinion, the Georgia Court of Appeals agreed with Respondents that § 50-2-21(b) has no application to this case and that, in any event, any argument that § 50-2-21(b) violated the 1836 Treaty was waived. (Pet.'s App. 1 (stating, "The issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief.").)

[8] The instant petition is not the first petition for a writ of certiorari that Petitioners have prepared in this case for filing in this Court. After the Georgia Supreme Court issued its 2001 Order, Petitioners prepared and attempted to file in this Court a petition for a writ of certiorari that was nearly identical to the petition currently pending before the Court. However, that petition was submitted late and was therefore dismissed. That late-filed 2001 petition did raise the question whether the Georgia Supreme Court's 2001 Order violated the 1836 Treaty. However, Petitioners never properly made this argument to any Georgia trial or appellate court.

demonstrate with particularity when and how the federal question was raised in the state court and when and how the question was passed on by the state court. In their petition, Petitioners do not even attempt to carry this burden. Petitioners do not specify when they allegedly raised in the state courts below the federal question presented in their petition, they do not specify the method by which they allegedly raised the federal question in the state courts below, nor do they specify how the state courts allegedly passed on the federal question. For this reason alone, the petition should be denied. Rule 14(i)(4) of the Supreme Court of the United States (stating that the petitioner's failure to "present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition").

II. The federal claim presented in the petition was not addressed by or presented to the Georgia Supreme Court.

With "very rare exceptions," *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992), this Court adheres to the rule in reviewing state court judgments that it will not consider a petitioner's federal claim unless "it was either addressed by, or properly presented to, the state court that rendered the decision" that the Court is being asked to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). *See also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (stating that, when the highest state court has failed to pass upon a federal question, the Court will assume that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary).

In this case there can be no question that the Georgia Supreme Court did not have a fair opportunity to address the federal question presented in the petition. Petitioners never even cited the 1836 Treaty in their briefs before the Georgia Supreme Court, let alone argue that the 1836 Treaty prevented the court from holding that the Georgia trial court had the inherent authority to dismiss Petitioners' claims on the basis of *forum non conveniens*. Petitioners' arguments before the Georgia Supreme Court rested exclusively on their interpretation of Georgia statutory and case law. In addition, Petitioners cannot dispute that the Georgia Supreme Court did not rule upon the federal question raised in the petition. In fact, the 1836 Treaty is not even mentioned in the Georgia Supreme Court's opinion.

As this Court has repeatedly held, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). By refusing to consider federal claims that were not addressed or presented to the state courts, the Court affords "state courts 'an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes' that could obviate any challenges to state action in federal court." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 221-222 (1983)). Here, the Georgia Supreme Court had an undeniable interest in having the opportunity to determine in the first instance whether a ruling that the Georgia trial court did have the inherent authority to dismiss Petitioners' claims for *forum non convenines* would contravene the 1836 Treaty. As this Court has repeatedly recognized, the denial of that opportunity should lead the Court to deny the petition.

III. The petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review.

Even assuming the question presented in the petition was properly presented to and ruled upon by the Georgia Supreme Court (which it was not), the petition should, in any event, be denied. The question presented in the petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review.

The relevant provision of the 1836 Treaty between the United States and Venezuela limits the right of court access to those individuals:

> who may be ***in the territories*** subject to the jurisdiction of the one or the other, ***transient or dwelling therein***, leaving open and free to them the tribunals of justice, for their judicial recourse, on the same terms which are usual and customary with the natives and citizens of the country ***in which they may be***.

Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, Jan. 20, 1835, U.S.-Venez., art. 13, 8 Stat. 466, 472 (1836). The "transient or dwelling therein" language used in the 1836 Treaty was replicated in at least seventeen other treaties concluded between the United States and other countries between 1824 and 1923, of which only a handful remain in force. *See* Robert R. Wilson, *Access-to-Court Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20. 38 (1953).

The "transient or dwelling therein" language found in the 1836 Treaty limits court access to those aliens (unlike Petitioners) who are physically present in the United States. The language is in sharp contrast to provisions of later Friendship, Commerce and Navigation ("FCN") treaties, which unconditionally grant equal access to courts to "the nationals of each" country, irrespective of residence, domicile, or physical presence. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Dec. 8, 1923, U.S.-Ger., art. 1, 44 Stat. 2132, T.S. No. 725 (1923); *see also Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2nd Cir. 1996) (noting that the FCN treaty between the United States and Ireland provides for "national treatment with respect to ... having access to the courts of justice" and that, in contrast, the Berne Convention contains no such language); Wilson, *supra*, at 44-45 (collecting treaty citations).

The courts that have carefully construed the "transient or dwelling therein" limitation at issue in the 1836 Treaty have held the language not to permit (on their own authority, absent other treaty, statutory or common law authorization) equal access to courts for individuals who are not at least physically present in the United States at the time the suit is instituted. *See, e.g., Da Rocha v. Bell Helicopter Textron, Inc.*, 451 F. Supp.2d 1318, 1323 (S.D. Fla. 2006) (("[The 1836 Treaty] plainly refers only to legal actions involving citizens of one signatory who are 'transient or dwelling in the territory of the other signatory.'"); *Morales v. Ford Motor Co.*, 313 F. Supp.2d 672, 686-87 (S.D. Tex. 2004) (construing identical language in a 1829 treaty with Brazil and concluding, "Nothing within this provision [the "transient or dwelling therein" language] suggests that [foreign] plaintiffs not located in the territory of the United States may

bring suit within the latter's courts for events that took place abroad on equal footing with citizens of the United States.").[9]

This interpretation by United States courts of the "transient or dwelling therein" language, which has its roots in a decision dating back over a hundred years, *see*, *e.g.*, *Atocha's Case*, 8 Ct. Cl. 427 (1872) (construing identical language of the 1831 treaty with Mexico and concluding that it applied only to "American citizens residing in Mexico" or Mexican citizens residing in the United States), *mandamus denied*, 84 U.S. 439 (1873), should be dispositive here.[10] The plain language of the 1836 Treaty limits its application to individuals physically present within the United States, and

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[9] Petitioner's reliance on *Atlantic Coast Lines v. Wiggins*, 49 S.E.2d 909, 77 Ga. App. 756 (1948) at footnote 1 of the petition, is unavailing. That case does not concern the "transient or dwelling therein" language of the 1836 Treaty, but, rather, the analytically distinct concept of jurisdiction over transitory actions in tort. *Wiggins*, 49 S.E.2d at 911, 77 Ga. App. at 759.

[10] Although not cited by Petitioners, Respondents have identified one possible contrary ruling by the federal Circuit Courts of Appeal, *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993). In *Blanco*, the Second Circuit suggests that the 1836 Treaty between Venezuela and the United States might be applicable to a Venezuelan plaintiff not physically located in the United States. However, the Second Circuit's reference to the 1836 Treaty is arguably dicta and did not directly address the phrase "transient or dwelling therein" found in the 1836 Treaty. Moreover, the Second Circuit ultimately ruled that a *forum non conveniens* dismissal was nonetheless appropriate in circumstances comparable to those presented in this litigation. *See id.* at 981 (applying *Gilbert*'s private and public factors and holding that plaintiff's contacts with the American forum were tenuous and that an adequate remedy existed in Venezuela).

this Court has previously held that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectation of its signatories.'" *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 181 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963).)

In this case, it is undisputed that each of the petitioners is a non-resident alien. Because they are not physically present within the United States and were not physically present within the United States either at the time of their alleged injury or when this lawsuit was filed, the 1836 Treaty has no application to their case. The "transient or dwelling therein" language of the 1836 Treaty does not render the Georgia Supreme Court's opinion in violation of federal law and does not grant to Petitioners an unqualified right of access to Georgia's trial courts to try their claims for injuries allegedly incurred in Venezuela. For all these reasons, the petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

WILLIAM N. WITHROW, JR.
Counsel of Record
NORMAN L. UNDERWOOD
LYNETTE EADDY SMITH
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

Counsel for Respondents